LIBRARY
COURT, U. S.
Supreme Court, U. S.
DEC 10 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-724

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and BRADY-HAMILTON STEVEDORE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Don S. Willner
Gregory A. Hartman
WILLNER, BENNETT,
RIGGS & SKARSTAD
900 Corbett Bldg.
Portland, Oregon

Counsel for Petitioner

December 10, 1974

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	4
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	20
1. THE DECISION BY THE BOARD WHICH WAS AFFIRMED BY THE NINTH CIRCUIT EXEMPTING ALL § 8(a)(3) VIOLATIONS OCCURRING IN THE CONTEXT OF § 10(k) WORK DISPUTES IS IN DIRECT CONFLICT WITH THE CONGRESSIONAL PURPOSE IN ENACTING THESE TWO STATUTES AND THE BOARD SHOULD BE INSTRUCTED TO DECIDE § 8(a)(3) and § 10(k) DISPUTES EACH ON THEIR OWN MERITS.	21
CONCLUSION	35
APPENDIX (Judgment and Opinions Below).	1a

CITATIONS

Cases:

American Ship Building v. NLRB, 380 US 300 (1965).	27,31,32

Index Continued

Page

Associated Transport, Inc., 203 NLRB 139, 83 LRRM 1522 (1973) 27

Henderson v. Local 701, Case No. 69-258 (D. Oregon 1969) . . . 12

Kinney Construction Company, 143 NLRB 120, 53 LRRM 1490 (1963) 28

NLRB v. Local 825, IUOE, 400 US 297 (1971). 33,35

NLRB v. Plasterers' Union Local No. 79 (Plasterers') 404 US 116 (1971). 25

NLRB v. Radio and Television Broadcast Engineers Union Local 1212 (CBS), 364 US 573 (1960) 31,32

Radio Officer's Union v. NLRB, 347 US 17 (1954) 27,28

Statutes and Miscellaneous:

Labor-Management Relations Act, § 8(a)(3), 29 USC § 158(a)(3). 4

Labor-Management Relations Act, § 8(b)(4)(D), 29 USC § 8(b)(4)(D) 6

Labor-Management Relations Act, § 10(k), 29 USC § 160(k) 5

Index Continued

Page

Labor-Management Relations Act,
§ 10(1), 29 USC § 160 (1) 6

93 Cong. Rec. 6860 (1947). 21,22

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and BRADY-HAMILTON STEVEDORE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, International Union of Operating Engineers, Local 701, hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 11, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit dated September 11, 1974 has not been reported. It is reprinted in the Appendix hereto, p. 1a infra. The Decision and Order of the National Labor Relations Board, hereinafter called "Board," has been reported at 198 NLRB No. 18, 80 LRRM 1611 (1972). It is reprinted in the Appendix hereto, p. 2a infra.

JURISDICTION

The petitioner union, International Union of Operating Engineers, Local 701, hereinafter called "Operating Engineers 701" filed a charge against Brady-Hamilton Stevedore Company, hereinafter called "Brady-Hamilton," under § 8(a)(3) of the Labor Management Relations Act, 29 USC § 158(a)(3), alleging that Brady-Hamilton discriminatorily fired the floating crane operators who were members of Operating

Engineers 701, and replaced them with members of International Longshoremen's & Warehousemen's Union, Local 50, hereinafter called "Longshoremen 50." The Board Trial Examiner found that a discriminatory firing had occurred. The Board, after oral argument in Washington D.C. before the full Board, held by a three to two vote that there could never be a § 8(a)(3) violation by an employer in the context of a § 10(k), 29 USC § 160(k), work dispute. Operating Engineers 701 then petitioned the Ninth Circuit Court of Appeals for review of the Board order. The Ninth Circuit denied the petition and affirmed the Board order. This petition for writ of certiorari has been filed within 90 days from the entry of the Ninth Circuit's judgment of September 11, 1974. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. May the Board create an exception to the coverage of § 8(a)(3) by holding that an employer's discriminatory conduct is completely insulated from review when a § 10(k) work dispute is also before the Board?

STATUTORY PROVISIONS INVOLVED

Section 8(a)(3) of the Labor Management Relations Act, 29 USC § 158(a)(3):

> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section

159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally available to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 10(k) of the Labor Management Relations Act, 29 USC § 160(k):

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute

> out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 8(b)4(D) of the Labor Management Relations Act, 29 USC § 8(b)(4)(D):

> "(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work."

Section 10(l) of the Labor Management Relations Act, 29 USC § 160(l):

> "(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning

of paragraph (4) (A),(B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law:....."

* * * * * * * * * *

STATEMENT OF THE CASE

This case involves a firing of Operating Engineers 701 members by Brady-Hamilton and replacing them with members of Longshoremen 50. The issue is whether Brady-Hamilton's discriminatory conduct in firing Operating Engineers 701 members is completely insulated from review because of the § 10(k) work dispute over who will operate the floating cranes loading logs from water to ships in the Port of Astoria, Oregon, at the mouth of the Columbia River.

The facts as found by the Trial Examiner and affirmed by the Board are as follows: For approximately five years prior to April 3, 1969 members of Operating Engineers 701 operated ten barge mounted water-borne whirly-type power cranes to load logs from the water into the holds of ships. Logs are floated down the Willamette and Columbia Rivers to the Port of Astoria either in rafts of individual logs or in bundles of various

sizes and there loaded on and stowed in vessels by employees of stevedoring companies. Individual logs and small bundles can be handled by ship's gear. The larger bundles, some weighing as much as 35 tons can only be raised from the water by the use of barge mounted cranes.

After using Willamette-Western cranes on an as-available basis for several years, Brady-Hamilton obtained the barge cranes Titan and Amazon on a time charter on November 1, 1966. During the following year Brady-Hamilton also leased the barge cranes Sampson and Goliath from Willamette-Western.

When the charters for the Sampson and Goliath were renewed in 1968, the charter party covering both vessels provided:

> "5. It is further agreed that the Owner will provide its employees on a 'loaned' basis for the operation of the vessels and that Owner will bill Charterer, not less than once each month, for Owner's labor costs referrable to such employees including

> overhead and administration. However, during the time such crewmen are so provided on a 'loan' basis, they shall be deemed for all purposes the employees of the Charterer, including but not limited to any liability incurred by the Charterer by reason of any act or omission of such employees resulting in loss or damage to third parties, fellow employees and/or to the vessels themselves. Charterer shall also maintain proper workmen's compensation on the crewmen provided. As used herein the term 'workmen's compensation' embraces Longshoremens' & Harbor Workers' compensation as well as State of Oregon Workmen's compensation to the extent the same may be applicable."

The renewed charter party covering the Titan and Zeus contained an identical clause.

Operating Engineers 701 operators and oilers turned in their time daily to Dale Larson, Brady-Hamilton's supervisor of the crane operators. Willamette had no supervisor in Astoria and the operators were paid only for that time which Larson approved. Larson also made recommendations concerning the competency of crane operators and another Brady-Hamilton foreman ordered overtime when necessary.

From the time of the first charter through April 2, 1969: Willamette (1) paid all operators and oilers on the chartered barge cranes, (2) paid all social security and unemployment insurance taxes, (3) reported all employment for social security and unemployment administration purposes, (4) withheld income taxes, computed withholding amounts, and reported tax withheld and paid over to the Government the tax withheld, (5) accepted, prepared and issued forms W-2 and W-4 with respect to income tax withholding and reports of income received and the other matters covered by such reports, and (6) paid and reported the amounts required by the AGC-Local 701 contract to be paid to the Health and Welfare Trust Fund, the Construction Industry Advancement Fund and the Pension Fund set forth in said contract.

Willamette then billed back to Respondent and collected from Respondent the gross wages

itemized above and in addition the required federal and state employment taxes on said gross wages, and the employer contributions required by the terms of the AGC-Local 701 contract. Larson was responsible for the cranes and maintenance was performed by Larson, the operators and oilers. There was one operator and one oiler to each barge and while on working time, they were completely subject to the direction of Larson on all aspects of their work. On the basis of this and other facts the Trial Examiner held and the Board affirmed that Brady-Hamilton and Willamette Western were co-employers of the Operating Engineers 701 employees. This determination of the co-employer status of Brady-Hamilton and Willamette Western was independently made by the District Court in Henderson v. Local 701, Case No. 69-258 (D. Oregon 1969) in the context of a 10(1) injunction hearing.

On April 3, 1969, at 7:00 a.m., Longshoremen 50 held a meeting which was attended by Larson, a member of Longshoremen 50. At the meeting it was determined that Longshoremen 50 would no longer work with Operating Engineers 701 operators on the floating cranes. As was their custom, the Operating Engineers 701 employees arrived at work about 7:40 a.m. and began getting the cranes ready for operation. At 8:00 a.m. Operating Engineers 701 lowered the slings into the water as they had done for the past five years and Longshoremen 50 refused to hook up the bundle of logs onto the slings. Longshoremen 50 immediately claimed that the refusal to hook up the logs was related to health and safety.

Sometime prior to 8:00 a.m., Stanley Radovich, a member of Longshoremen 50 and a superintendent of Brady-Hamilton, overheard Larson on the telephone saying that

Longshoremen 50 was going to refuse to continue to work with Operating Engineers 701.

At about 8:00 a.m. Larson and Radovich contacted Lewis Kennedy and Neil Whisnant in Portland, both of whom were partners of Brady-Hamilton. Kennedy and Whisnant were informed that Longshoremen 50 were refusing to work with the Operating Engineers 701 operators on the cranes for health and safety reasons. The health and safety subterfuge was immediately recognized by Kennedy and it was assumed by all that this was an attempt by Longshoremen 50 to claim the work of operating the floating cranes.

At approximately 8:15 a.m. Kennedy phoned Don Ray of Willamette-Western Corporation from whom the floating cranes had been leased and informed Mr. Ray that Longshoremen 50 were refusing to continue working with Operating Engineers 701 operating the cranes.

Ray informed Kennedy that Willamette-Western would have no objection to Kennedy's proposal to remove the Operating Engineers 701 crane operators and replace them with Longshoremen 50 operators.

Some time subsequent to the telephone call to Mr. Ray and perhaps as late as 8:30 a.m., Kennedy telephoned William Ferguson, Oregon Area Manager for Pacific Maritime Association, and informed him of the work dispute. Ferguson responded that the health and safety issue was obviously ridiculous and advised Kennedy that the Longshoremen 50 contract did not cover the work of operating the floating cranes. At approximately 8:20 a.m., Kennedy telephoned Larson and told him to order the Operating Engineers 701 crane operators off the floating cranes. Shortly thereafter and certainly before 8:30 a.m., Larson told the Operating Engineers 701 crane

operators and oilers that they were fired and to pack up their gear and get off the cranes.

The Trial Examiner clearly found that the Operating Engineers 701 crane operators were discharged before 8:30 a.m. on April 3, 1969, at which time the Pacific Maritime Association was insisting to Brady-Hamilton that Longshoremen 50 members must continue to work with the Operating Engineers 701 operators, and before Brady-Hamilton was advised that Longshoremen 50 may have any contract claim to the work. It was recognized by all that the health and safety issue was an obvious ruse and, in fact, at approximately 8:15 of that morning, Radovich called Kennedy to inform him that the Longshoremen 50 was claiming the contested work under their contract, rather than as any health and safety precaution. A little later that day, the manager of

W.J. Jones & Son told the General Construction Company crane operators that they also would no longer be needed to operate the floating cranes. Brady-Hamilton and Jones, as members of the Pacific Maritime Association, asked for an immediate arbitration on the health and safety issue and the arbitrator decided there was no legitimate health and safety dispute. However, by this time the work of operating the floating cranes had already been turned over to Longshoremen 50 who were attempting to operate the cranes.

As a result of this dispute, Operating Engineers 701 filed a § 8(b)(4)(D) charge against Longshoremen 50. On April 5, Operating Engineers 701 requested Brady-Hamilton to reinstate the Engineers, and on April 8, filed a § 8(a)(3) charge against Brady-Hamilton. The General Counsel held the unfair labor practice charges in abeyance and proceeded with the

§ 10(k) hearing. Thereafter, the Board in its Decision and Determination of Dispute, concluded that Brady-Hamilton and Willamette were joint employers of the Operating Engineers 701, and determined that Longshoremen 50 was not entitled by means proscribed by § 8(b)(4)(D) of the Act to force or require Brady-Hamilton to assign the work to Longshoremen, and awarded the work to employees represented by Operating Engineers 701.

After Longshoremen 50 refused to comply, the Board issued a complaint charging Longshoremen 50 with a violation of § 8(b)(4)(D) of the Act, and after a two day hearing, the Board unanimously found Longshoremen 50 guilty of violating § 8(b)(4)(D). The Board also overruled a Trial Examiner's finding that Brady-Hamilton had violated § 8(a)(3) and held in a split decision with a strong dissent that a violation of

§ 8(a)(3) was not possible in the context of a § 10(k) work dispute. The Board ruled that the only way to implement a § 10(k) decision was through economic pressure which would be insulated from an § 8(b)(4)(D) charge against the union by the employer because of the outcome of the § 10(k) work dispute hearing. The Ninth Circuit Court of Appeals denied the petition for review of the Decision and Order of the Board filed by Operating Engineers 701. The rationale for the court's position was that the Operating Engineers 701's prayer for relief was predicated upon the Board's award of the disputed work to Operating Engineers 701 in the § 10(k) hearing and since the court had already vacated that decision as arbitrary and capricious, the prayer for relief must be denied.

Operating Engineers 701 now petition for certiorari.

REASONS FOR GRANTING THE WRIT

The Trial Examiner of the Board found that the employer discriminatorily discharged employees. The Board by a three to two vote then held and the Ninth Circuit Court of Appeals affirmed that a violation of § 8(a)(3) by an employer must be ignored if it occurs in the context of a § 10(k) work dispute regardless of the facts. This decision will allow employers to abuse their discretion and make discriminatory hirings and firings so long as a § 10(k) work dispute exists or can be manufactured. This Court must review that decision so that § 8(a)(3) will not be emasculated. Individual rights must not be returned to the arbitrary discretion of employers that existed before what was then § 8(3) was adopted in 1935. This Court has never decided the proper relationship between §§ 8(b)(4)(D) and 8(a)(3).

1. THE DECISION BY THE BOARD WHICH WAS AFFIRMED BY THE NINTH CIRCUIT EXEMPTING ALL § 8(a)(3) VIOLATIONS OCCURRING IN THE CONTEXT OF § 10(k) WORK DISPUTES IS IN DIRECT CONFLICT WITH THE CONGRESSIONAL PURPOSE IN ENACTING THESE TWO STATUTES AND THE BOARD SHOULD BE INSTRUCTED TO DECIDE § 8(a)(3) AND § 10(k) DISPUTES EACH ON THEIR OWN MERITS.

When § 8(b)(4)(D) of the Taft-Hartley Act was being considered, its author Senator Robert Taft said:

> "I have no hesitation in saying that this subsection applies not only to strikes over the assignment of particular work to one union rather than another, but also to the assignment of work to one union rather than another group of employees. It is submitted, however, that this is not a proper criticism of this section since under the Labor Relations Act at the present time an employer would be violating subsection 8(3) if he discharged or discriminated against some employees merely to provide work to members of a union. Under existing law, employers have no right to accede to such union demands unless there is a closed or union-shop agreement in effect. If an employer discriminates in the assignment of work so as to encourage a non-union group by assigning them work which properly

> should be performed by union employees, it would be an unfair labor practice under the provisions of existing law and the conference bill. In other words all that this amendment to the Senate bill does is to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by the operation of section 8(3) of the present Wagner Act. [Emphasis supplied.]" 93 Cong. Rec. 6860 (1947)

Senator Taft's language makes clear that the enactment of § 8(b)(4)(D) was never intended to prevent the Board from finding a § 8(a)(3) violation in a proper case.

Here there is no question that the members of Operating Engineers 701 were discharged because they were members of the wrong union. When Longshoremen 50 refused to hook up to the floating cranes, Brady-Hamilton could have requested them to work as directed under the existing contract with the Longshoremen's Union or it could have obtained a § 10(k) injunction through the Board. Instead, acting under the very considerable influence of its

only two supervisors then in Astoria, both of whom were members of Longshoremen 50, it fired the Operating Engineers thirty minutes after the dispute arose and replaced them with Longshoremen.

The Trial Examiner found that the discharges were discriminatory. The case was then argued before the full Board in Washington, D.C., which allows oral argument less frequently than this Court grants certiorari.

Thereafter, by a three to two vote, the Board dismissed the complaint. The majority essentially relied on the argument that once a jurisdictional dispute developed, the employer could not commit a violation of § 8(a)(3). The minority responded:

> "certainly, there is nothing in our statute to suggest that because a union [Longshoremen 50] violates one section of the Act, we cannot find that an employer [Brady-Hamilton] violates another section." (See p. 19a, infra)

The minority goes on to point out --

1. "First, the Respondent discriminatorily discharged the operating engineers prior to any 10(k) determination by us, and the violation of 8(a)(3) took place at that time . . ."

2. "Secondly, indications that the policies and purposes of the act contemplated 8(a)(3) violations in work dispute situations are first found in the supplementary analysis that Senator Taft had inserted in the Congressional Record, 93 Cong. Rec. 6860 (1947), when, in considering Sections 8(b)(4)(D), he stated: . . . 'In other words all that this amendment to the Senate bill does is to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by the operation of section 8(3) of the present Wagner Act.'"

3. "The Respondent's position could adequately have been protected had it invoked the procedures of the Act, unless, as it must have known, its position was unlawful."

4. "Lastly, it appears that the policies of the act are being completely frustrated by the decision of our colleagues today." (See, p. 20a-24a, infra)

The issue is not whether a § 8(a)(3) violation automatically follows every jurisdictional dispute, but whether the

existence of a jurisdictional dispute prevents a § 8(a)(3) violation where there is a discriminatory discharge of employees.

This issue seems to have been caught up and obscured in a great deal of verbiage concerning the implementation of § 10(k) decisions through § 8(a)(3). The Board decision at p.13a, infra, contains a long discussion of the impropriety of implementing a § 10(k) decision by the Board through the use of a § 8(a)(3) back pay and reinstatement remedy. Operating Engineers 701 has never contested the fact that in accordance with the Plasterers' decision, NLRB v. Plasterers' Union Local No. 79, 404 US 116, 126 (1971), the only tactic which a union can use in order to enforce a § 10(k) decision is economic pressure upon the employer which is protected from § 8(b)(4)(D) proscription through the § 10(k) decision.

This same confusion of issues is revealed in both the brief of Brady-Hamilton at p. 22 and the brief of the Board at p. 9 which were submitted to the Ninth Circuit Court of Appeals. The Ninth Circuit apparently was not able to resolve this confusion as it ruled that since the § 10(k) work award had been overruled as arbitrary and capricious any § 8(a)(3) charge against the employer must also be dismissed. The only time the real issue was squarely addressed was in the dissent to the Board's decision in which it was stated that § 8(a)(3) and § 10(k) are complimentary and neither preempts the operation of the other.

It is an unfair labor practice according to § 8(a)(3) to discriminate in hiring or firing or in any other conditions of employment on the basis of union affiliation. It has been uniformly held that the key

to the finding of a § 8(a)(3) violation is a showing of improper motivation on the part of the employer. Radio Officer's Union v. NLRB, 347 US 17, 43 (1954); American Ship Building v. NLRB, 380 US 300, 311 (1965). In addition, it has been held that specific intent is not a necessary element of a § 8(a)(3) violation and when the natural consequences of an employer's actions are discriminatory, sufficient motivation has been shown in order to find a § 8(a)(3) violation. Radio Officer's Union v. NLRB, supra, at 44. Although the typically thought of case of a § 8(a)(3) violation involves employer discrimination against employees who have engaged in union activities, § 8(a)(3) has also been held to apply to cases of a union's forcing out non-union employees, Associated Transport, Inc., 203 NLRB 139, 83 LRRM 1522 (1973) and to discrimination among members of different

locals of the same union, Kinney Construction Company, 143 NLRB 120, 53 LRRM 1490 (1963). Disparate working conditions based on union membership have also been held to violate § 8(a)(3). Radio Officer's Union v. NLRB, supra.

In the instant case the Trial Examiner held that the actions of Brady-Hamilton clearly fell within the proscriptions of § 8(a)(3). The Trial Examiner held that any reference to health and safety was a mere ruse, that references to the Longshoremen contract were an afterthought, and that the discriminatory discharge of Operating Engineers 701 employees was the employer's choice. The Decision by the Board in no way disturbed these findings of fact or the decision that they were sufficient to constitute a § 8(a)(3) violation; but the Board ruled that § 8(a)(3) violations were impossible in the context of the § 10(k)

work dispute. The Board fell into the trap of discussing the § 8(a)(3) violation as a means of implementing the § 10(k) work award.

Although the Board Decision and the brief of the Board before the Ninth Circuit take the position that there can be no § 8(a)(3) violation in the context of a § 10(k) work dispute, even the brief of Brady-Hamilton at p. 42 admits that if affirmative bad faith were shown on the part of an employer in discriminatorily discharging an employee, a subsequent § 10(k) proceeding would provide no protection. It seems obvious that this is the correct result; otherwise, employers could engage in bad faith discriminatory hirings and firings if they could also arrange a § 10(k) work dispute to cover their actions. There is such evidence in our case. Larson, the Brady-Hamilton

supervisor who fired the Operating Engineers, was a member of Longshoremen 50 and attended the Longshoremen union meeting earlier that morning where the work stoppage was plotted.

If § 10(k) were construed as an exception to § 8(a)(3), an employer could with complete impunity engage in union busting tactics through the simple expedient of having the favored employees engaged in a § 10(k) work dispute with those being discriminatorily discharged. Thus, an employer could select sweetheart unions or could pick and choose between various weak and strong unions without fear of a § 8(a)(3) charge. Certainly no one, including the Board, would hold that such a result is mandated by the Labor Management Relations Act.

The real reason that the Board held that § 10(k) was an implied exception to § 8(a)(3)

was because of a fear that an employer in a § 10(k) work dispute would be placed on the horns of a dilemma in choosing the union that would continue to perform the work until the § 10(k) dispute could be resolved. (See, p. 10a, infra) As shown by the discussion above, this fear is completely unfounded since as a minimal requirement of § 8(a)(3) it must be shown that an employer acted with improper motivation in hiring or firing an employee. It is beyond dispute that an employer who acts after a careful consideration of the economic facts and without any improper motivation to choose one of two unions in a § 10(k) dispute would not have violated § 8(a)(3). American Ship Building v. NLRB, supra, at 311. See also, NLRB v. Radio and Television Broadcast Engineers Union Local 1212 (CBS), 364 US 573 (1960). This is true without any judicially construed exception to § 8(a)(3),

but merely because a prima facie showing of improper motive is necessary in any § 8(a)(3) case. Section 8(a)(3) is not meant to take away all employer discretion in hiring and firing in the context of a § 10(k) work dispute or any other situation. American Ship Building v. NLRB, supra, at 313. It is merely meant to proscribe employer hiring or firing based on improper motivations which discriminates either for or against a particular union.

The prime purpose of enacting §§ 10(k) and 8(b)(4)(D) was to promote industrial peace and not to protect individual rights. See, CBS, supra, at 577. Section 8(a)(3) can continue to operate in a § 10(k) context and protect individual rights while at the same time promoting the industrial peace which is the purpose of § 10(k). By providing a back pay and reinstatement remedy, § 8(a)(3) can complement § 10(k) and discourage an employer from

making a discriminatory hiring or firing and then attempting, as in this case, to prolong the § 10(k) and § 8(b)(4)(D) proceedings during which time those employees who were discriminated against are not doing the work that they should be doing.

In our case, the Operating Engineers who were discharged on April 3, 1969, are still not operating the floating cranes in Astoria, Oregon. If Operating Engineers 701 ultimately wins the § 10(k) dispute, this provides no redress for the individuals. The Ninth Circuit opinion deprives them of their rights. In contrast, NLRB v. Local 825, IUOE, 400 US 297 (1971) held that a § 10(k) work dispute provided no insulation against a union violation of § 8(b)(4)(B) when the union attempted to force employers to commit a § 8(a)(3) violation. There the Court found no conflict between the protection of the public

interest through §§ 10(k) and 8(b)(4)(D) and the protection of private interests through §§ 8(A)(3) and 8(b)(4)(B).

In the instant case, Brady-Hamilton was not faced with a dilemma on the morning of April 3, 1969, when Longshoremen 50 refused to continue working with the Operating Engineers 701 crane operators. Rather than responding to Longshoremen 50 pressure and discriminatorily discharging Operating Engineers 701 employees, Brady-Hamilton could have maintained the status quo while referring the Longshoremen 50 health and safety complaint to an arbitrator as required in the contract. If Longshoremen 50 had expanded their complaint to include a contractural claim to the operation of the floating cranes, Brady-Hamilton could have maintained the status quo, through the operation of a § 10(l) injunction against picketing if necessary, until a reasoned

decision based on all factors could have been made. See e.g., NLRB v. Local 825, IUOE, supra. Such a decision without any discriminatory motives would not have been susceptible to a § 8(a)(3) attack, with or without any later § 10(k) proceeding.

CONCLUSION

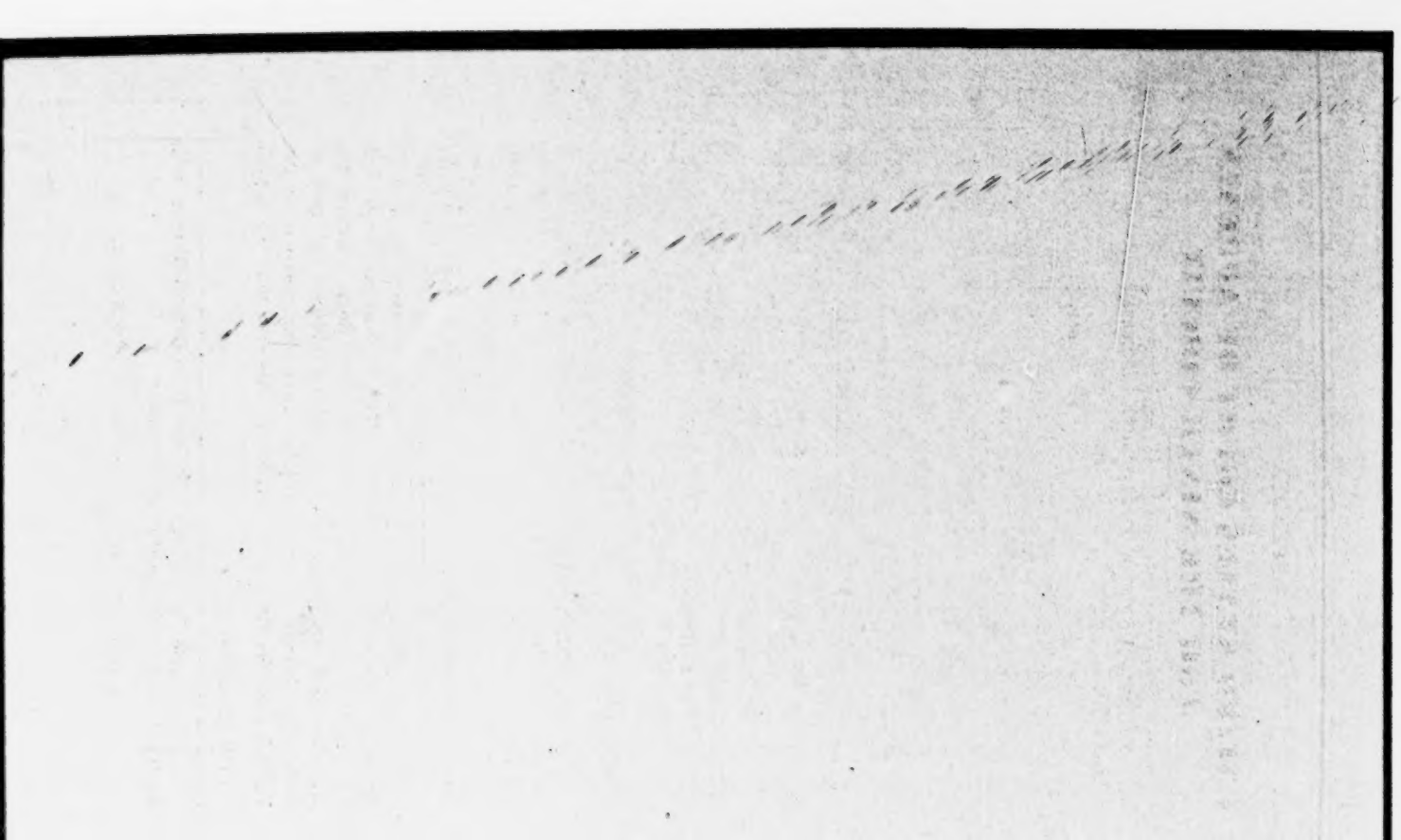
The decision of the majority of the Board sustained by the Ninth Circuit deprives eight individual floating crane operators and oilers of the guarantees of § 8(a)(3) because of a jurisdictional dispute that was not of their making. Neither the Ninth Circuit nor this Court has the duty in the first instance of determining whether the specific facts establish a discriminatory discharge. But to allow the Board to refuse to look at the § 8(a)(3) facts because of the conduct of another union

is a deprivation of individual rights.

Respectfully submitted,

Don S. Willner
Gregory A. Hartman
WILLNER, BENNETT,
RIGGS & SKARSTAD
900 Corbett Building
Portland, Oregon

December 9, 1974 Counsel for Petitioner



APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent,* BRADY-HAMILTON STEVEDORE CO., *Intervenor.*	No. 72-2334

[September 11, 1974]

On Petition for Review of an Order of the National Labor Relations Board

Before: MERRILL and DUNIWAY, Circuit Judges, and TAYLOR,* District Judge.

OPINION

DUNIWAY, Circuit Judge:

This is a companion case to those decided in *NLRB v. International Longshoremen's and Warehousemen's Union, Local 50,* No. 72-1908 and Nos. 72-2263 and 72-2315, ... F.2d ..... (August 29, 1974).

Here, the Engineers petition for review of a decision and order of the Board in which the Engineers' requests for relief were denied. The prayer for relief was predicated upon the Board's award of work to the Engineers in a §10(k) hearing, involved in No. 72-1908, *supra.* There, we hold that the Board's award was arbitrary and capricious and we deny enforcement of, and set aside, the Board's order. It follows from our decision in No. 72-1908 that the Engineers' petition in this case must be denied.

Petition denied.

*The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 9-17-74—480

APPENDIX

198 NLRB No. 18 D--6411
Astoria,Ore.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRADY-HAMILTON STEVEDORE COMPANY

and

INTERNATIONAL UNION of OPERATING ENGINEERS, LOCAL 701, AFL--CIO

Cases
36--CA--1871
36--CA--1871--2

DECISION AND ORDER

On April 26, 1971, Trial Examiner George H. O'Brien issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a memorandum in support, and the Charging Party filed a brief. Subsequently, the Respondent filed a supplemental brief and another brief in response to the General Counsel's exceptions.

Pacific Maritime Association (PMA), the

bargaining representative for the Respondent Employer, requested oral argument. Pursuant to the Board's decision to grant PMA's motion, oral arguments in this case were heard before the Board on October 4, 1971.

The Board [1/] has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions only to the extent consistent herewith.

In its log-loading operations at the port of Astoria, Respondent, a stevedoring company, leased four whirly-type floating

---

1/ Member John A. Penello, who succeeded to the Board after the oral argument presented by the parties, has reviewed the entire record including the arguments advanced during oral argument and is participating in the disposition of this case.

barge cranes from Willamette Western Corporation, [2] complete with an operator and oiler on each, under a charter arrangement stating that those employees "shall be deemed for all purposes" employees of Respondent. For approximately 4 years prior to April 3, 1969, operating engineers, members of Local 701, had operated the cranes. These employees took orders from Dale Larson, Respondent's gear-locker man, who was responsible for the cranes and who approved the time cards of the engineers and oilers. Over Larson is Stanley Radovich, a superintendent of Respondent, who happened to be in Astoria on April 3, 1969.

2/ Willamette was a member of AGC, which maintained a collective-bargaining agreement with the Operating Engineers. Respondent, Brady, is a member of PMA, which maintains a bargaining contract with Longshoremen.

Sometime prior to 8 a.m. on April 3, Radovich heard Larson on the telephone say "Local 50 had a meeting this morning and they are going to refuse to hook logs," on certain ships. A few minutes later, Radovich was told by the longshore foreman that "We are going to have trouble this morning, the longshoremen are going to refuse to hook onto the logs with the 701 or Willamette operators on the cranes." As was the custom, at 8 a.m., the engineers presented the slings from the cranes to the longshoremen who were in the water, but the longshoremen refused to take the slings. Thereafter, Kennedy, one of Respondent's partners, was informed by both Larson and Radovich that ILWU Local 50 members were insisting that the operators and oilers be members of ILWU, and "that until we terminated the operators and oilers who were members of 701 from the cranes the Local

50, ILWU men would not sling logs for loading." [3/] In another conversation a few minutes later, Kennedy instructed Larson to tell the 701 operators and oilers to come off the machines and instructed Radovich "to get members of the ILWU to hoist the cranes." Radovich protested, indicating that ILWU men were not prepared to operate the cranes, but Kennedy insisted. Eventually, log loading continued that day through the use of the ships' gear rather than use of floating barge cranes. The floating barge cranes were towed away from the ships and the operators and oilers have not since been reemployed by Respondent. Longshoremen have operated the cranes that

---

3/ There was some claim of health and safety which was the subterfuge used in view of the "no-strike" clause in the PMA-ILWU contract. PMA, at that time in the morning, was telling Respondent that longshoremen had to work with 701 men and that PMA was attempting to resolve the health and safety issue.

have been used since April 3.

As a result of the dispute, Local 701 filed 8(b)(4)(D) charges against Local 50. On April 5, Local 701 requested Respondent to reinstate the engineers and, on April 8, filed the instant charge alleging a violation of Section 8(a)(3) by Respondent. PMA filed 8(b)(4)(D) charges against Local 701 after that Union picketed to regain the work for its members, but the Regional Director dismissed those charges after the Board issued its Decision and Determination of Dispute, infra.

The General Counsel held the unfair labor practice charges in abeyance and proceeded with the 10(k) hearing. Thereafter, the Board, in its Decision and Determination of Dispute, [4/] concluded that Respondent and

---

4/ International Longshoremen's & Warehousemen's Union, Local No. 50 (Brady-Hamilton Stevedore Company and Willamette-Western Corporation), 181 NLRB 315. On November 12, 1970, the Board denied PMA's motion

Willamette were joint employers of the engineers, determined that Local 50 was not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Respondent to assign the work to longshoremen, and awarded the work to employees represented by the Operating Engineers. When the Longshoremen refused to comply with the award, the General Counsel issued a complaint alleging violations of Section 8(b)(4)(i) and (ii)(D) of the Act, relying on the 10(k) record to establish a violation. The Board subsequently issued its Decision finding the 8(b)(4)(D) violation as alleged. See 193 NLRB No. 37.

The Trial Examiner found that the

---

for reconsideration. On December 29, 1970, the Court of Appeals for the Ninth Circuit entered its judgment dismissing PMA's petition for direct review of the 10(k) award. On March 14, 1972, the United States Court of Appeals reversed the District Court's denial of a request to dissolve an injunction against the Operating Engineers.

engineers and oilers were employees of Respondent and that Respondent knew they were members of Local 701 and were not members of, or represented by, Local 50 and had not been dispatched from the PMA-ILWU hiring hall. In concluding that Respondent discharged the operators and oilers because they were members of Local 701 and because they were not members of Local 50, and for no other reason,in violation of Section 8(a)(3), the Trial Examiner stated that Respondent's reliance on the terms of the PMA-ILWU contract was a pure afterthought. Moreover, in rejecting Respondent's argument that the discharge of Local 701 operators and oilers was required or permitted by the express terms of the agreement between Respondent and ILWU, the Trial Examiner examined the contract, gave it a lawful construction, and concluded it did not authorize Respondent to modify its method

of doing business by ceasing to use the services of employees supplied by Willamette.

Considering the context in which this case arose, we do not agree with the Trial Examiner's rationale or conclusions. In finding an 8(a)(3) violation, the Trial Examiner concluded Respondent discharged the eight employees for no other reason than that they were members of Local 701 and were not members of Local 50. In making this finding, the Trial Examiner apparently overlooked the fact that this would be the normal situation, with the usual consideration attendant, where two unions are competing for a particular work assignment. The background of this case is the conflict between two union groups for the disputed work of operating the whirly-type floating barge cranes. Accordingly, we must, in applying the act, determine whether Section 8(a)(3) is applicable in

situations where the actions of all parties are part and parcel of an acute, bona fide jurisdictional work dispute.

It is clear that Sections 8(b)(4)(D) and 10(k) were enacted as part of the Taft-Hartley amendments in 1947 against a background of industrial strife caused by jurisdictional disputes between unions and between unions and unorganized groups of employees. When Congress enacted those sections, it was no doubt aware of the complex issues and considerations involved in such disputes and of the many factors, often closely balanced, supporting separate and distinct claims to the same work by various groups. The result was that Congress provided in Section 10(k) the mechanism for the Board to determine the underlying dispute and make an award of the work and created in Section 8(b)(4)(D) an unfair labor practice by a union who uses unlawful

means to force an employer to assign particular work to a particular group of employees. Thus, the 10(k)--8(b)(4)(D) sections of the Act dictate the procedure the Board is to follow in work assignment dispute situations. 5/

The design of the statute was recently spelled out by the Supreme Court in its discussion of 10(k) in N.L.R.B. v. Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' International Assn., AFL--CIO, 404 U.S. 116, 126--127 (1971), where the Court expressly held that employers are to be considered parties to a work assignment dispute, whether the employers are neutral or whether they have substantial economic interests in the

---

5/ See Radio and Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, (Columbia Broadcasting System), 364 U.S. 573.

outcome. The Court said:

> ...the §10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding; the impact of the §10(k) decision is felt in the §8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a §10(k) decision against it, a §8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the §10(k) decision and the employer does not comply, the employer's §8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. [fn. 19 omitted] Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the §10(k) decision, but both will lose their §8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The Employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's §10(k) decision. [Emphasis supplied.]

In keeping with the Supreme Court's edict, we would not implement our 10(k) determina-

tions via the 8(a)(3) route, which was designed to deal with an entirely different type of problem. 6/

Our decision herein does not indicate that the Charging Party is without an effective remedy. As the successful union in the 10(k) proceeding, Local 701 is free to engage in economic pressure against the Respondent to enforce the award without running afoul of Section 8(b)(4)(D), and to this extent, at least, the Respondent is bound by the 10(k) determination. Although this economic pressure may not be as effective as an unfair labor practice finding and an order to reinstate, we view the policies and purposes of the 10(k) procedures as

---

6/ Member Fanning finds additional support for this position in his dissenting opinion in Local 5, United Association of Journeymen and Appretices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL--CIO (Arthur Venneri Company), 145 NLRB 1580, 1601.

controlling. Accordingly, we shall dismiss the complaint herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D.C. Jul 12 1972

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KENNEDY AND PENELLO, dissenting:

We do not disagree with the facts as stated by the Trial Examiner and found in the majority decision. Our disagreement is with the conclusion of law reached by our colleagues based on those facts. For the following reasons we would reach a result contrary to our colleagues, but compatible with the finding of a violation by the Trial Examiner.

The issue is whether the Respondent violated Section 8(a)(3) when it discharged eight operating engineers and replaced them with longshoremen for the sole reason that they were members of the Operating Engineers Union and were not members of the Longshoremen's Union. The Trial Examiner found, and our colleagues do not dispute this finding, that the only reason for the operating engineers' discharge and replacement at that time was because they were

members of the wrong union. 7/ However, our colleagues refuse to find a violation of Section 8(a)(3) because it occurred during a jurisdictional dispute, with its normal background of union membership, allowing an exception to the application of 8(a)(3), and that the policies of the Act require that we ignore 8(a)(3) and instead implement our 10(k) procedures.

We are well aware that the background of this case consists of a conflict between two union groups for an award of disputed work. Concerning that background, and its relation to Sections 8(b)(4)(D) and 10(k), the Trial Examiner specifically

---

7/ Indeed, the record, much of which was recited in the Trial Examiner's Decision, conclusively shows that the Respondent's only motive in discharging the operating engineers was so it could replace them with members of the favored Longshoremen. Even at this stage, our colleagues do not refute the obviously discriminatory intent of Respondent.

declared the legal conclusion, which we adopt, that Section 8(b)(4)(D) was designed for the protection of neutral employers, but that it was not designed to shield either employers or unions from the consequences of violations of other sections of the Act. 8/ By their decision today, our colleagues are doing just that. To us, however, this is just the usual classic 8(a)(3) situation--the Employer discriminatorily discharged eight employees simply because they were not members of a favored union, but were members of a disfavored union--and the Employer's action violated both the encouragement portion and discouragement portion of Section 8(a)(3). In such a situation, the Respondent Employer should not

---

8/ N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL--CIO, 400 U.S. 297 (1971).

be shielded from its violations of the Act simply because one, either, or both of the contesting unions violated another section of the Act. Certainly, there is nothing in our statute to suggest that because a union violates one section of the Act, we cannot find that an employer violates another section.

We agree that the policies and purposes of the 10(k) procedures are controlling and that the 10(k)-8(b)(4)(D) sections of the Act dictate the procedure the Board is to follow in work assignment dispute situations. We do not agree, however, that we must look to the 10(k) procedures where other sections of the Act are violated, nor do we agree that the policies and purposes of the Act are enhanced by dismissing the allegation in this particular situation.

Regarding the policies of the Act as they affect Sections 10(k), 8(b)(4)(D), and

8(a)(3), we do not believe the 10(k) procedures take preference here. First, the Respondent discriminatorily discharged the operating engineers prior to any 10(k) determination by us, and the violation of 8(a)(3) took place at that time. Accordingly, we would not be implementing our 10(k) determinations via the 8(a)(3) route, but would be finding a violation of 8(a)(3) at the time it occurred.

Secondly, indications that the policies and purposes of the Act contemplated 8(a)(3) violations in work dispute situations are first found in the supplementary analysis that Senator Taft had inserted in the Congressional Record, 93 Cong. Rec. 6860 (1947), [9/] when, in considering Section 8(b)(4)(D), he stated:

9/ See II Leg. Hist. 1624 (1947).

> I have no hesitation in saying that this subsection applies not only to strikes over the assignment of particular work to one union rather than another, but also to the assignment of work to one union rather than another group of employees. It is submitted, however, that this is not a proper criticism of this section since under the Labor Relations Act at the present time an employer would be violating subsection 8(3) if he discharged or discriminated against some employees merely to provide work to members of a union. Under existing law, employers have no right to accede to such union demands unless there is a closed or union shop agreement in effect. If an employer discriminates in the assignment of work so as to encourage a non-union group by assigning them work which properly should be performed by union employees, it would be an unfair labor practice under the provisions of existing law and the conference bill. In other words all that this amendment to the Senate bill does is to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by the operation of section 8(3) of the present Wagner Act. [Emphasis added.]

Later, the Supreme Court commented on the procedural and substantive aspects of the Board's interpretation of 8(b)(4)(D)

and 10(k) in the C.B.S. case.[10/] The Board had argued, inter alia, that a final and binding award under 10(k) would be inconsistent with Section 8(a)(3) and 8(b)(2) of the Act on the ground that the determination of jurisdictional disputes on their merits by the Board might somehow enable unions to compel employers to discriminate in regard to employment in order to encourage union membership. In rejecting the Board's approach to 10(k), the Court stated, inter alia:

> The argument here, which is based upon the fact that § 10(k), like § 8(b)(4)(D), extends to jurisdictional disputes between unions and unorganized groups as well as to disputes between two or more unions, appears to be that groups represented by unions would almost always prevail over nonunion

---

10/ N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212, IBEW (C.B.S.), 364 U.S. 573, 584.

> groups in such a determination because their claim to the work would probably have more basis in custom and tradition than that of unorganized groups. No such danger is present here, however, for both groups of employees are represented by unions. Moreover, we feel entirely confident that the Board, with its many years of experience in guarding against and redressing violations of §§ 8(a)(3) and 8(b)(2), will devise means of discharging its duties under § 10(k) in a manner entirely harmonious with those sections. [Emphasis supplied.]

Thus, congressional history surrounding the enactment of Section 10(k) expressly contemplates that traditional remedies, and the Supreme Court impliedly suggested that 8(a)(3) and 8(b)(2) are not mutually exclusive of the 10(k)-8(b)(4)(D) procedures.

Thirdly, in considering that the policies of the Act are to prevent labor strife and discord, we must note that the Respondent Employer here did not seek redress under our Act, but acted precipitately by capitulating to the unlawful acts of the favored

union. The Respondent's position could adequately have been protected had it invoked the procedures of the Act, unless, as it must have known, its position was unlawful.

Lastly, it appears that the policies of the Act are being completely frustrated by the decision of our colleagues today. We have previously found, pursuant to the 10(k) procedures invoked by the Charging Party, that the alleged discriminatees, represented by the Operating Engineers, are entitled to the work. We have further found that the longshoremen, represented by the Longshoremen, the defiant respondent in the 8(b)(4)(D) case, are not entitled to the disputed work. But in this case we say that it is useless for the discriminatees and their representative to invoke the peaceful procedures of the Act to seek redress.